85 - 1347

No. _____

IN THE

Supreme Court of the United States

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

GEORGE F. RITCHIE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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88 pp

QUESTION PRESENTED FOR REVIEW

Has the Supreme Court of Pennsylvania impermissibly expanded the constitutional protections mandated by the Sixth Amendment by concluding that an accused in a rape-incest prosecution invariably is entitled, on the strength of a speculative claim of need, to unrestricted pre-trial access to presumptively confidential, non-prosecutorial records concerning the child-victim and her family, despite their prior in camera review by the trial judge for statements attributable to the victim, and notwithstanding the fact that the prosecution neither possessed nor employed the materials at any stage of the criminal proceeding?

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OPINIONS BELOW

The majority and dissenting Opinions of the Supreme Court of Pennsylvania, copies of which are set forth as Appendix A, are as yet unreported. The majority Opinion and concurring and dissenting statements of of the Superior Court of Pennsylvania, set forth as Appendix B, are reported at 324 Pa. Super. 557, 472 A.2d 220 (1984).

STATEMENT OF JURISDICTION

The Judgment of the Supreme Court of Pennsylvania was entered on December 11, 1985, and this petition was filed within sixty (60) days of that date in compliance with Rule 20(1) of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

PENNSYLVANIA STATUTE INVOLVED

Act 1975, November 26, P.L. 438, No. 124, §15 provides:

Confidentiality of Records.

(a) Except as provided in section 14, reports made pursuant to this act including but not limited to report summaries of child abuse made pursuant to section 6(b) and written reports made pursuant to section 6(c) as well as

any other information obtained, reports written or photographs or x-rays taken concerning alleged instances of child abuse in the possession of the department, a county public child welfare agency or a child protective service shall be confidential and shall only be made available to:

(1) A duly authorized official of a child protective service in the course of his official duties.

(2) A physician examining or treating a child or the director or a person specifically designated in writing by such director of any hospital or other medical institution where a child is being treated, where the physician or the director or his designee suspect the child of being an abused child.

(3) A guardian ad litem for the child.

(4) A duly authorized official of the department in accordance with department regulations or in accordance with the conduct of a performance audit

as authorized by section 20.

(5) A court of competent jurisdiction pursuant to a court order.

* * *

STATEMENT OF THE CASE

A. Statement of the Proceedings

Respondent, George F. Ritchie, was charged by Information filed August 17, 1979, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, with Rape,[1] Involuntary Deviate Sexual Intercourse,[2] Incest,[3] and

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1 18 Pa. C.S. §3121 (Pennsylvania Crimes Code). Rape is a felony of the first degree punishable by a term of imprisonment, the maximum of which is more than ten (10) years. 18 Pa. C.S. §106(a)(2).

2 18 Pa. C.S. §3123. Involuntary Deviate Sexual Intercourse is a felony of the first degree.

Corrupting the Morals of Minors[4] in four respective counts. The matters were tried to a jury, and on November 13, 1979, respondent was adjudicated guilty as charged.

Respondent was sentenced January 8, 1981, to terms of incarceration of three (3) to ten (10) years for Rape and Involuntary Deviate Sexual Intercourse, to be served concurrently; additional terms of two and one-half (2 1/2) to five (5) years were imposed at the remaining counts, also to be served concurrently

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FOOTNOTE 3, FROM PAGE 4.

3 18 Pa. C.S. §4302. Incest is a misdemeanor of the first degree punishable by a term of imprisonment not to exceed five (5) years. 18 Pa. C.S. §106(a)(6).

4 18 Pa. C.S. §6301. Corruption of Minors is a misdemeanor of the first degree.

with those imposed at Counts One and Two.

On February 3, 1984, the Superior Court of Pennsylvania rejected respondent's appellate claims regarding the evidentiary sufficiency of the prosecution's case and the trial court's disposition of certain evidentiary matters not here relevant. However, the judgments of sentence were vacated, and the case was remanded to the trial court with directions to "review the CWS records in camera to determine whether they contain any statements made by Jeanette regarding abuse." Commonwealth v. Ritchie, 324 Pa. Super. 557, ___, 472 A.2d 220, 226 (1984)(Appendix B). Respondent -- through counsel -- was then to be permitted to review, in their entirety, those records to which he had been denied pre-trial access "in order to argue the relevance of the material

in accordance with the trial judge's decision." Ibid.

The Commonwealth thereafter sought and was granted review of the Superior Court's remand order. The question presented and argued to the Supreme Court of Pennsylvania was "[t]o what extent may a defendant in a child rape-incest prosecution be authorized pretrial access to records or files prepared pursuant to the reporting requirements of the child protective services law for his possible use at trial to impeach or discredit a witness-victim?"

The Supreme Court of Pennsylvania, by an Order dated December 11, 1985, affirmed the Superior Court's disposition of the case (Appendix C), persuaded by respondent's contention that the trial court's denial of his pre-trial request for production of the disputed materials

deprived him of his rights to confrontation and compulsory process guaranteed by the Sixth Amendment (Majority Opinion at 12, Appendix A).

B. Statement of the Facts Material to the Question Presented.

The charges against respondent arose following the disclosure by his then thirteen-year-old daughter Jeanette, made in confidence to an older cousin, that she had been subjected to her father's sexual depredations over a period of about four (4) years (TT 34-35, 49-51, 132-133).[5] The cousin shared this confidence with her mother, the victim's aunt (TT 133-134), who ultimately escorted the victim to police headquarters where a formal complaint

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5 Trial Transcript, November 7, 1979.

was made (TT 52-55). Specifically, the victim alleged that on June 11, 1979, respondent forced her to fellate him and them compelled her to submit to vaginal intercourse (TT 24-27, 32-34).

In pre-trial pleadings, respondent initially sought discovery from the Commonwealth of "results or reports of scientific tests, expert opinions ... or other physical or mental examination of Jeanette Biles [sic]." (RR 7).[6] Thereafter respondent subpoenaed Child Welfare Services (CWS)[7] for "records

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6 Reproduced Record of the proceedings.

7 CWS is the Allegheny County child protective services agency charged with the responsibility of monitoring and investigating reports of suspected child abuse. The agency has since been redesignated as Children and Youth Services (CYS).

pertaining to Jeanette Bills, a.k.a. Jeanette Ritchie." (RR 10). Apparently meeting with no success, respondent -- through counsel -- filed a pleading captioned Motion for Sanction, averring, inter alia, that CWS personnel "absolutely refused to recognize the authority of the subpoena." (RR 9).

The trial judge convened a pre-trial conference in chambers to hear argument on the motion. In the course of the proceeding, counsel for respondent attempted to persuade the court that:

> There is possible witnesses available out of these reports. [sic] ... There is a medical report in that file that I know about .... I'd like to see the doctor's report .... That physical examination was taken on behalf of Child Welfare Services .... The other thing is this. Whether or not their records would disclose witnesses that are not known to this defendant [sic] .... There could be defense witnesses disclosed by their records here. There could be matters in there that could be favorable to the defendant.

(HT 4-6, 10).[8]

CWS, represented at the pre-trial proceeding by an Assistant County Solicitor and an agency record custodian, explained that the agency's files contained no records of a medical examination of the victim (HT 5). Respondent's counsel, however, insisted that " ... there may not be anything [in these files], but they [CWS] have it ...." Ibid. The Assistant County Solicitor

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8 Transcript of hearing on pre-trial Motion for Sanction, October 23, 1979. This hearing was not part of the appellate record before the Superior Court prior to its February 3, 1984, judgment and order. The proceeding was recorded but not transcribed until February, 1984, at the request of the Commonwealth. Subsequently, the transcript was made a part of the record reviewed by the Supreme Court of Pennsylvania.

responded, "Those are the records of the agency." Ibid. The CWS record custodian informed the trial judge that the agency's involvement with the victim did not commence until June 22, 1981 (HT 6, 8). With respect to the non-medical materials sought by respondent's counsel, the trial court observed that " ... you are not entitled [to review the agency files] because you are not making specific allegations that can be verified or determined." (HT 10-11). The trial judge finally concluded that the medical records did not exist and entered the following Order:

> And now, October 23, 1979, after hearing in chambers, the Court having viewed the records of the Child Welfare Services, the Court finds that no medical records are being held by [the agency] that would be of benefit to the defendant in this case. Counsel for the Commonwealth, and the defendant, and a representative of the [agency] being present at the hearing.

(RR 11). Respondent's counsel immediately objected to the Order, saying that "the court did not review the records." The trial court retorted, "We didn't read 50 pages or more of an extensive record. We have asked for the medical records. There were no medical records that the court reviewed, and that is what we were told." (HT 15-16).

In directing the trial court to reconvene a hearing and to grant counsel access to the disputed records, ostensibly for the narrow purpose of arguing their relevance and utility in the event of a retrial, the Superior Court cited Davis v. Alaska, 415 U.S. 308 (1974) for the proposition that where there is tension between a defendant's right of confrontation and a state's interest in insuring the confidentiality of sensitive records, a delicate balancing must occur. The court concluded, however,

"that the need for confidentiality in this case must .... yield to appellant's right of confrontation." Commonwealth v. Ritchie, 324 Pa. Super. at ____, 472 A.2d at 225 (Appendix B).

The Supreme Court of Pennsylvania's affirmance was premised on the Sixth Amendment "counters" of the right of the accused to confront the witnesses against him and to have compulsory process for obtaining witnesses in his favor (Majority Opinion at 8, Appendix A). Following a review of several of this Court's decisions in which Sixth Amendment questions were presented, the Pennsylvania court concluded that Davis v. Alaska was the federal decision which was dispositive of the controversy. Applying Davis, the court held that the "counters" of confrontation and compulsory process tipped in favor of the respondent under a Sixth Amendment analysis. Id. at 10, 12.

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT OF PENNSYLVANIA HAS MISINTERPRETED THE SCOPE OF THE PRINCIPLE ANNOUNCED IN DAVIS V. ALASKA AND HAS ERRONEOUSLY CONSTRUED THE CONFRONTATION AND COMPULSORY PROCESS CLAUSES OF THE SIXTH AMENDMENT.

A. The protections afforded by the Sixth Amendment have not been extended to require the pre-trial intrusion into confidential records ordered by the Supreme Court of Pennsylvania. Despite the Supreme Court of Pennsylvania's observation that "'[t]he search for truth' and the quest for 'every man's evidence' [is] so plainly the basis of the Sixth Amendment, ..." (Majority Opinion at 11, Appendix A), this Court, in United States v. Nixon, 418 U.S. 683, 709 (1974), has embraced the venerable principle that there is a category of persons whose evidence is protected by privilege. Indeed, in McCray v. Illinois, 306 U.S. 300, 308 (1967), this

Court quoted approvingly Professor Wigmore's grudging concession of the importance of testimonial privileges regarding the "'identity of persons supplying the government with information concerning the commission of crimes.'" (Emphasis in the original). "'Communications of this kind," Wigmore admonished, 'ought to receive encouragement.'" Ibid.

In holding that the Sixth Amendment "counters" outweigh petitioner's interest in maintaining the confidentiality of the disputed records, and that respondent's pre-trial access to the materials may not be fettered by one not blessed with the "eyes and perspective of an advocate," (Majority Opinion at 12, Appendix A), the Supreme Court of Pennsylvania has unnecessarily and impermissibly expanded the principles announced in Davis v. Alaska, supra. In

the process, the Court has seriously undermined the announced purpose of Pennsylvania's Child Protective Services Law[9] -- to encourage more complete reporting of suspected child abuse. Moreover, the decision calls into question the continuing constitutional validity of common law and statutory privileges generally, ignores the traditional role of the trial judge in evaluating the validity of evidentiary privilege -- in fact, disregards totally the trial court's exercise of discretion in the regulation of the flow of evidence -- and conflicts directly with analogous cases reported in the United States

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9 Act 1975, Nov. 26, P.L. 438, No. 124, §2, imd. effective as amended 1982, June 10, P.L. 460, No. 136, §1, effective in 60 days; 1983, Oct. 21, P.L. 169, No. 42, §2, effective in 60 days.

Court of Appeals and the Supreme Court of Connecticut. See, Camitsch v. Risley, 705 F.2d 351 (9th Cir. 1983) and State v. Storlazzi, 191 Conn. 453, 464 A.2d 829 (1983).

In elegant contrast to the precise offer of proof presented by defense counsel in Davis v. Alaska -- in opposing a protective order drawn to prevent any reference to the record of juvenile adjudications of the prosecution's primary witness -- is the speculative, generalized claim of need advanced by respondent's counsel in the case at bar. In Davis, counsel disclaimed the intent to attack the seventeen-year-old witness' character generally, proposing instead to explore the witness' possible motivation to testify falsely. Counsel surmised that the witness' potential bias would be exposed if a connection could be made between his probationary

status and his eagerness to please law enforcement officials by testifying favorably. 415 U.S. at 311. In this case, however, respondent's counsel's proposal to breach the cloak of confidentiality of the Child Protective Services Law was accompanied by the following: "There is possible witnesses available out of those reports .... There could be defense witnesses disclosed .... There could be matters ... favorable to the defendant." (HT 4, 10)(emphasis supplied). It is unclear from the record whether respondent's counsel anticipated that the requested disclosure would yield information which had potential utility as substantive evidence or whether he sought the material for its impeachment value.

Nevertheless, in Davis v. Alaska, this Court permitted a limited foray into matters cloaked with that state's

considered grant of privilege based on defense counsel's narrowly tailored proffer and in contemplation of the careful balancing which must be exercised when the two worthy claims are in tension. The Supreme Court of Pennsylvania, on the other hand, has ignored totally the state's interest in encouraging more complete reporting of child abuse. The court has apparently determined that any defendant prosecuted for any offense involving children has an absolute right to investigate CWS files in preparing for trial. This unrestricted access would, of course, permit counsel to discover not just statements of the victim, or summaries of interviews with victims, but all of the necessarily raw social service data gathered by child protective service caseworkers, identities of family, friends, or neighbors who consented to

be interviewed, and -- critically in our view -- the identity of the individual who made the report which triggered the investigation.

Petitioner contends respectfully that the decision in Davis v. Alaska and this Court's construction of the relevant clauses of the Sixth Amendment do not comprehend such an intrusion. Moreover, we view the Pennsylvania Supreme Court's decision as countenancing the classic "fishing expedition" disapproved in the disclosure cases of this Court. United States v. Nixon, supra, 418 U.S. at 700 (see also, Dissenting Opinion at 2, Appendix A).

Your petitioner contends that such intrusions will seriously hamper law enforcement in this unique and sensitive area. Obviously, a crucial source of information regarding sexual offenses against children -- the family member or

friend who relies on the anonymity of the statute -- is gravely threatened. It is unrealistic, in the Commonwealth's view, to expect that the anonymity will be long preserved after it has been disclosed to counsel for a defendant. Notwithstanding the Court's exhortation regarding the dissemination permitted following counsel's review (Majority Opinion at 13, n. 16; Appendix A), petitioner is not sanguine that witnesses will step forward freely when it becomes apparent that counsel for an accused will be granted unlimited access to the entire file maintained by the child protective service agency.

Moreover, it would appear that the decision below will seriously disrupt the orderly process of discovery regulated by the Pennsylvania Rules of Criminal Procedure, Rule 305, 42 Pa. C.S. The Commonwealth is concerned that

(unlike the present case in which the disputed records were never possessed by the prosecution) all of its files, probative or not, material or not, inculpatory or not, are subject to production to the demanding defendant in a case involving selected offenses against children.

Your petitioner is obliged to note that relevant amendments have been made in the Child Protective Services Law which post-date the events from which this controversy arose. On June 10, 1982, the Pennsylvania General Assembly expanded the class to whom reports made pursuant to the statute were to be made available. Included in that expanded class are law enforcement officials[10]

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10 The term includes a county District Attorney. 55 Pa. Code §3490.4, published at 15 Pa. B. 4554 (December 21, 1985).

investigating reports of homicide, sexual abuse or exploitation, and serious bodily injury involving children. Act 1982, June 10, P.L. 460, No. 163, §15 (a)(9), (10). The release of such data, however, may not include the identity of the person who made the report of suspected abuse or of any person who cooperated in a subsequent investigation of the matter without a prior determination by the Secretary of the Department of Public Welfare that such a disclosure would not endanger the safety of the interested person. Id., §15(c).[11]

Petitioner does not understand these amendments to diminish the

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11 The Secretary of the Department of Public Welfare is required to notify such person prior to releasing such information. 55 Pa. Code §3490.94, published at 15 Pa. B. 4561 (December 21, 1985).

concerns previously expressed regarding the apparently unlimited scavenging of sensitive material authorized by the Supreme Court of Pennsylvania's decision in Commonwealth v. George F. Ritchie.

The Commonwealth believes that Ritchie is irremediably in conflict with Camitsch v. Risley, 705 F.2d 351 (9th Cir. 1983), and, as a consequence, we respectfully contend that the issue thus presented merits review by this Court. Camitsch involved a habeas corpus claim by a Montana prisoner who was refused access to the information contained in potential prosecution witnesses' juvenile case files, typically described as the juveniles' "history," for use at his trial on various sexual offenses involving children.

Camitsch sought pre-trial discovery of the youth court files for impeachment purposes. The trial court denied his

request but agreed to review the files in camera to determine whether they contained anything affecting the potential witnesses' competency or credibility. Id, 705 A.2d at 352. Camitsch was ultimately found guilty. On appeal the Montana Supreme Court held that Camitsch's right of confrontation had, indeed, been violated, but after determining that the error was harmless, affirmed the conviction. Id. at 753. In reviewing the habeas claim regarding the employment of a harmless error analysis by the state court, the United States Court of Appeals concluded:

> Camitsch attempts to expand the right of a criminal defendant under certain circumstances to introduce a juvenile offender's 'record' (i.e., the fact of a delinquency adjudication and probationary status) into a general right to rummage through the otherwise confidential case files of every juvenile witness. Davis [v. Alaska] will not stretch that far.

Ibid.

The Camitsch court noted pertinently that:

> Davis does not change the fact ... that the sensitive informal information found in a juvenile case file may be shielded from disclosure.
>
> * * *
>
> The bare contention that it is impossible to tell how defense counsel might have been able to use the various information ... is insufficient to support a finding of constitutional error in denying access [emphasis in original].
>
> * * *
>
> Camitsch does not allege that [the in camera inspection] was erroneous, but rather that had he had access to the file he might have been able to persuade the trial court to make a different finding. We are unable to find a constitutional violation on these facts.

Id. at 354. Petitioner urges this Court to adopt the reasoning of the Camitsch decision and, by analogy, to reject the constitutional analysis employed by the Supreme Court of Pennsylvania in

Ritchie. We submit that this case is appropriate for summary disposition. Cf. Delaware v. Fensterer, (No. 85-214), ___ U.S. ___, 38 Cr. L. 4067 (November 4, 1985).

Similarly, in State v. Storlazzi, 191 Conn. 453, 464 A.2d 829 (1983), the defendant, unsuccessfully, raised a Sixth Amendment claim because of the trial court's denial of pre-trial access to certain psychiatric and social agency records of the victim-complainant. The defendant sought to examine the materials for purposes of inquiring into the victim's competency to testify. The trial court ordered the records sealed, but after reviewing them in camera, denied the request. Id., 464 A.2d at 831. Counsel for defendant renewed his request following the victim's testimony on direct. Again, however, the trial court denied access. Ibid.

The Connecticut Supreme Court's initial analysis and rejection of the claim was premised exclusively on the Sixth Amendment right of confrontation[12] and included consideration of Davis v. Alaska in its discussion regarding the balancing of competing interests. Id. at 832-33. The court reviewed the disputed records and concluded that they failed "to disclose material especially probative ... so as to justify breaching their confidentiality in disclosing them to the defendant." Id. at 833.

B. To the extent that the judgment of the Supreme Court is unnecessarily expansive, imposing -- as a matter of federal constitutional law -- greater restrictions on the state's interest in

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12 The court similarly rejected Storlazzi's due process claim, apparently relying exclusively on federal authority.

preserving the statutory privilege of these or similar records when this Court has refrained from so doing, the decision is similarly flawed. Fare v. Michael C., 442 U.S. 707 (1979); Oregon v. Haas, 420 U.S. 714 (1975); North Carolina v. Butler, 441 U.S. 369 (1979).

II.

THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA IS PREMISED EXCLUSIVELY ON FEDERAL CONSTITUTIONAL AUTHORITY.

The Court's analysis of respondent's Sixth Amendment protections is supported by reference to Ohio v. Roberts, 448 U.S. 56 (1980), Alford v. United States, 282 U.S. 687 (1931), Smith v. Illinois, 390 U.S. 129 (1968), Washington v. Texas, 388 U.S. 14 (1967), United States v. Nixon, supra, and Davis v. Alaska, supra. The court discussed three other Pennsylvania cases, two involving decisions premised on Davis v. Alaska (see, Matter of Pittsburgh Action

Against Rape, 494 Pa. 15, 428 A.2d 126 (1981) and Commonwealth v. Slaughter, 482 Pa. 538, 394 A.2d 453 (1978)) and the third, cited for the importance of the "eye of the advocate" in assessing relevancy of evidence. Commonwealth v. Hamm, 474 Pa. 487, 378 A.2d 1219 (1977).

The Supreme Court of Pennsylvania was not presented with, and did not consider, alternative state grounds for decision.

CONCLUSION

In light of the foregoing authority, petitioner prays that a writ of certiorari should issue to review the Judgment and Opinion of the Supreme Court of Pennsylvania in Commonwealth v. Ritchie, ___ Pa. ___, ___ A.2d ___ (No. 69 W.D. Appeal Docket, 1984, filed December 11, 1985).

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Pennsylvania, Western District

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

No. 69 W.D. Appeal Dkt. 1984

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

vs.

GEORGE F. RITCHIE,
Appellee.

Appeal from the Order of the Superior Court of February 3, 1984, at No. 137 Pittsburgh, 1981, vacating the Judgment of Sentence entered January 8, 1981, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division at No. CC7903887A.

324 Pa. Super. 557, 472 A.2d 220 (1984).

Argued: March 4, 1985 Filed: December 11, 1985

OPINION

MR. JUSTICE McDERMOTT

The Commonwealth of Pennsylvania appeals, by allowance, the order of the Superior Court vacating judgment of sentence and remanding for further proceedings. We affirm and order the case remanded for proceedings consistent with this opinion.

Appendix A—Opinion of the Supreme Court of Pennsylvania, Western District.

Appellee, George F. Ritchie, stood jury trial in the Court of Common Pleas of Allegheny County, and was convicted of rape, involuntary deviate sexual intercourse, incest and corruption of minors.[1] The charges arose in connection with incidents allegedly involving sexual contacts between appellee and his minor daughter over a period of years, including one particular incident on June 11, 1979. Appellee's daughter was twelve years old at that time.

The circumstances giving rise to the instant appeal began in 1978, when appellee's counsel, in the course of preparing the defense, served a subpoena upon Child Welfare Services (CWS) seeking records pertaining to the complainant,[2] which records CWS refused to produce on the basis of the alleged confidentiality of the records. At a pretrial conference held in chambers before the trial court, counsel for appellee argued a motion for sanctions and sought access to the records in order to gain information which might impeach or discredit the complainant, or which might reveal potential witnesses. Moreover, defense counsel sought particular information concerning a medical examination of the victim which, according to his information, occurred on September 6, 1978, in conjunction with a CWS investigation. The trial court accepted the assertion of a CWS representative that such information was not in the file.[3] The court then issued an order to the following effect:

[1] Appellee's trial was his second, following a mistrial.

[2] There is evidence that Child Welfare Services conducted an interview and examination of the complainant as early as 1978, following a report of abuse made by an unidentified source.

[3] Pretrial Hearing Transcript, October 23, 1979, at 5.

Appendix A—Opinion of the Supreme Court of Pennsylvania, Western District.

> And now, October 23, 1979, after hearing in chambers, the court having viewed the records of the Child Welfare Services, the Court finds that no medical records are being held by the Child Welfare Services that would be of benefit to the defendant in this case. Counsel for the Commonwealth, and the defendant, and a representative of the Child Welfare Services being present at the hearing.

Hearing Transcript (H.T.) October 23, 1979, at 15. Appellee's counsel immediately objected to that order.

On appeal, the Superior Court rejected appellee's claims concerning the sufficiency and admissibility of certain evidence, but agreed with his contention that the trial court erred in refusing to grant appellee access to the Child Welfare Services[4] file pertaining to the examination of the complainant. The Superior Court held that a statutory provision in the Child Protective Services (Law)[5] regarding confidentiality of the records must not be permitted to infringe upon appellee's Sixth Amendment rights. *Commonwealth v. Ritchie,* 324 Pa.Super. 557, 472 A.2d 220 (1984). Nonetheless, that court refused to direct that the records be made available to appellee. Instead, relying an analogy on the decision of this Court in *Matter of Pittsburgh Action Against Rape, (Matter of Pittsburgh),* 494 Pa. 15, 428 A.2d 126 (1981), the Superior Court fashioned a remedy whereby the trial court would, after an *in camera* inspection of the file, make available to appellee only those parts of the file which it determined to constitute verbatim statements (or the equivalent) by the complainant

[4] That agency is now designated Children and Youth Services.

[5] Act of November 26, 1975, P.L. 438, No. 124 §§1-26, 11 P.S. §2201, *et seq. See also,* text accompanying n.10.

regarding abuse. *Matter of Pittsburgh, id.*, at 28, 428 A.2d at 132. That court further directed that counsel be permitted access to the entire record reviewed *in camera* by the trial court, in order to argue relevance.[6] It is the appropriateness of this remedy which lies at the heart of this appeal.

In their arguments both parties challenge the Superior Court's disposition. The Commonwealth argues that the records are presumptively confidential under the relevant statute.[7] Further, the Commonwealth argues that, if appellee's Sixth Amendment rights require that he be given access to statements contained in the CWS files, then that access should be restricted solely to such statements, and appellee's counsel should not be permitted access to the entire file to argue relevance. Appellee, on the other hand, argues that statements contained in the file constitute the minimal discovery to which he is entitled, and that, in fact, his Sixth Amendment rights require that he gain access to the entire file so that determinations concerning what information might be useful to the defense may properly be made by an advocate. For the reasons outlined below, we find persuasive appellee's arguments, and hold that the trial court erred in refusing to allow the defense access to the CWS files.

As indicated above, the Superior Court found guidance in the decision of this Court in *Matter of Pittsburgh*. In that case, we were asked to fashion a rule of confidentiality to protect information and materials in

[6] *Commonwealth v. Ritchie*, 324 Pa.Super 557, 568, 472 A.2d 220, 226 (1984).

[7] 11P.S. §2215.

the files of the Pittsburgh Action Against Rape (PAAR), a center providing counselling and help to victims of rape. The appellant there had asked for the right to inspect communications between the rape counsellors and the victim. While we declined an extension of the common law to create an absolute privilege,[8] we fashioned an *in camera* proceeding wherein defense counsel were permitted an inspection of "only those statements of the complainant contained in the file which bear on the facts of the alleged offense."[9] In the instant case, we are asked for more; we are asked for a review and inspection by counsel of all materials in the possession of CWS, that their relevancy might be determined and their uses in testing credibility ascertained. The sticking place is that the appellant is armed with a statute providing for confidentiality of the files of a child; and while they do not seek an absolute privilege under the statute, they take umbrage that the Superior Court directed:

> . . . counsel should be permitted access to this record in order to argue the relevance of the material in accordance with this decision. Counsel, of course, are permitted access to this record for this purpose only and are otherwise bound by the confidential nature of the material in the record.

Ritchie, supra, at 568, 472 A.2d at 226.

[8] The General Assembly subsequently codified a privilege for sexual assault counsellors by the Act of Dec. 23, 1981, P.L. No. 169 §1, 42 Pa.C.S. §5945.1.

[9] *Matter of Pittsburgh Action Against Rape (Matter of Pittsburgh)*, 494 Pa. 15, 19, 428 A.2d 126, 127-28 (1981).

In ascertaining the intent of the General Assembly we are guided by principals of statutory construction, including that presumption that "[e]very statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. §1921(a). Moreover, it may be presumed "[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." 1 Pa.C.S. §1922(3). Bearing these principles in mind, we turn to an analysis of the statute.

The Child Protective Services Law was enacted to identify and protect children suffering from abuse and to provide rehabilitative services to such children and their families.[10] In addition to providing procedures concerning the investigation and reporting of abuse cases,[11] the Law has a section providing for the confidentiality of such records, 11 P.S. §2215(a). The confidentiality provision provides that reports made pursuant to the Law shall be confidential, but shall be made available to certain enumerated classes of officials and groups. 11 P.S. §2215(a). Among those to whom such reports may be made available are included, notably, courts of competent jurisdiction pursuant to court order, §2215(a)(5). In addition, access must also be granted to guardians *ad litem*, officials of the Department of Public Welfare, and others.[12] Thus, this confidentiality

[10] See n. 5 *supra*.

[11] 11 P.S. §§2204-2214.

[12] At the time of appellee's trial, Section 2215(a) provided:

> Confidentiality of Records. (a) Except as provided in section 14, reports made pursuant to this act including but not limited to report summaries of child abuse made pursuant to section 6(b) and written reports made pursuant to section 6(c) as well as any other information obtained, reports written or photographs or

(Footnote continued on following page.)

provision, with all its enumerated exceptions, differs from the confidentiality and privilege provisions which the General Assembly has enacted concerning other counsellors, such as licensed psychologists, 42 Pa.C.S. §5944; or school personnel, 42 Pa.C.S. §5945; or sexual assault counsellors, 42 Pa.C.S. §5945.1.

The legislative purpose herein was clearly to create an agency, not only to investigate allegation of child abuse, but to provide care, shelter, and erase where possible the cruel stains upon their innocence. To accomplish this the statute provides for confidentiality and, as well, for exceptions to the confidentiality imposed; all are avenues

(Footnote continued from preceding page.)

> x-rays taken concerning alleged instances of child abuse in the possession of the department, a county public child welfare agency or a child protective service shall be confidential and shall only be made available to:
>
> (1) A duly authorized official of a child protective service in the course of his official duties.
>
> (2) A physician examining or treating a child or the director or a person specifically designated in writing by such director of any hospital or other medical institution where a child is being treated, where the physicians or the director or his designee suspect the child of being an abused child.
>
> (3) A guardian *ad litem* for the child.
>
> (4) A duly authorized official of the department in accordance with department regulations or in accordance with the conduct of a performance audit as authorized by section 20.
>
> (5) A court of competent jurisdiction pursuant to a court order.

Act of Nov. 26, 1975, P.L. 438, No. 124 §15, 11 P.S. §2215.

The law has subsequently been amended, and now provides for an expanded class of officials and groups to whom the reports may be made available, including the attorney general, county commissioners, and law enforcement officials. *See generally*, 11 P.S. §2215(a).

to help. As noted, one of the exceptions is to a court of competent jurisdiction, to which, by court order, all materials in the files of the child are necessarily accessible.

There is, of course, a difference between the types of protection that can be afforded a victim and one accused. The difference in all such considerations is the Sixth Amendment to the Constitution of the United States. There can be no absolute protections that cancel the fundamental mandates of that Amendment; all that can be accomplished is a careful balance between them, the counters always in favor of the Amendment.

The Sixth Amendment provides that an accused, "[i]n all criminal prosecutions . . . shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor."[13] The extent to which a criminal defendant can cross-examine the witnesses testifying against him is controlled by the confrontation clause of the Amendment. The purpose of that clause is to provide an accused with an effective means of challeging the evidence aginst him by testing the recollection and probing the conscience of an adverse witness. *Ohio v. Roberts*, 448 U.S. 56 (1980). Moreover, as the United States Supreme Court stated in *Alford v. United States*, 282 U.S. 687, 692 (1931), and more recently echoed with approval in *Smith v. Illinois*, 390 U.S. 129 (1968):

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a

[13] U.S. Constitution, Amendment VI.

> reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Id. at 132.

The United States Supreme Court has consistently emphasized the role of the truth-seeking process in our system of criminal justice. As it observed in *Dennis v. United States*, 384 U.S. 855, 870 (1966), "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." Claims of confidentiality or privilege, whatever their basis, necessarily carry with them the possibility of infringing upon that truth-seeking process. As Mr. Chief Justice Burger, writing for a unanimous court, observed of such privileges, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).[14] In that case, the Court held that a claim of executive privilege, itself of constitutional dimension, may not prevail as against the need for disclosure there at issue.

[14] *See Matter of Pittsburgh, supra*, at 28, 428 A.2d at 131 (1981).

The United States Supreme Court has also given close attention to state claims of privilege or confidentiality threatening to infringe upon a criminal defendant's federal constitutional rights. The Court has in such cases carefully safeguarded the Sixth Amendment rights of a criminal defendant to present relevant evidence on direct and cross-examination. In *Smith v. Illinois, supra*, the Court held that, notwithstanding a contrary state evidentiary law, the confrontation clause guarantees a defendant the right to cross-examine a prosecution witness as to his real name and address. In *Washington v. Texas*, 388 U.S. 14 (1967), the Court held that the compulsory process clause requires, even as against a contrary state provision, that a defendant be able to present the favorable testimony of a co-defendant. In *Davis v. Alaska*, 415 U.S. 308 (1974), the Court held that the right of confrontation was superior to a state law concerning the confidentiality of juvenile proceedings. The Court expressed concern that the effect of the state's confidentiality provision in that case may have been to allow the testifying witness to give a questionable truthful answer, and to prohibit the defendant from testing the truth of that testimony through the process of cross-examination. *Id.* at 314. That concern, inherent in the whole confidentiality/privilege area, may not be ignored without Sixth Amendment ramifications.

Turning to our own case law, we have set precedent in *Matter of Pittsburgh* that is useful here. In that case, we declined to recognize a common law absolute privilege, just as the General Assembly has declined to do in the instant case by providing exceptions in the statute. In

Matter of Pittsburgh, we gave what we were asked, to wit, inspection of communications between the victim and personnel of PAAR. Now we are asked for the right to inspect the entire file. The rationale for such a request is the same rationale underlying the right granted in *Matter of Pittsburgh*, to inspect prior statements of a victim or witness. In short, as with prior statements, the eye of an advocate may see connection and relevancy in any material gathered from the victim, other witnesses, or circumstances developed by the investigation of a child.[15] *See also, Commonwealth v. Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977). "The search for truth" and the quest for "every man's evidence" so plainly the basis of the Sixth Amendment, and so aptly applied in *Matter of Pittsburgh*, are as applicable to any material as to prior statements. When materials gathered become an arrow of inculpation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it. Otherwise, the Sixth Amendment can be diluted to mean that one may face his accusers or the substance of the accusation, except when the accuser is shielded by legislative enactment.

Fortunately, we are not required here to find the present statute unconstitutional. The General Assembly has properly excepted courts of competent jurisdiction and has clearly recognized that material in the child's file

[15] This conclusion applies with special strength under the amended provisions of the statute, which would seem to enable the prosecution to gain access to the records, either directly or in the course of investigations by law enforcement officials. *See* n. 13, *supra*, and 11 P.S. §2215(a) generally.

cannot be denied them. Since the use of that which is within the jurisdiction of the court must conform to the fundamental law of the land, the defendant's entitlement to them is therefore to be determined by those Sixth Amendment principles heretofore considered.

Given those principles, we must conclude that the trial court erred in refusing appellee access to the CWS files. As in *Davis, supra*, we find that the Commonwealth's interest in maintaining the confidentiality of these records may not override a defendant's right to effectively confront and cross-examine the witnesses against him. We agree with appellee that it would be absurd to read the statute as providing that the records be made available to a court of competent jurisdiction, while denying any use of them to the litigants in a criminal case before such courts. Notwithstanding the trial court's "finding" that the files contained nothing that would benefit appellee, it is apparent that appellee was denied the opportunity to have the files reviewed with the eyes and the perspective of an advocate. Neither the confidentiality provision of the Child Protective Services Law nor any other argument yet advanced justifies that denial.

Accordingly, we remand the matter to the trial court with instructions that appellee, through his counsel, be granted access to the CWS files.[16] Counsel will then be

[16] As we emphasized in *Matter of Pittsburgh, supra*, at 28-29, 428 A.2d at 132-133, the trial court should take appropriate steps to insure against the improper dissemination of sensitive material gleaned from the files. Such steps might include the fashioning of appropriate protective orders, or conducting certain proceedings *in camera*, mindful always, however, of the right of appellee, through his counsel, to gain access to the information.

permitted to argue to the trial court what use, if any, could have been made of the files in cross-examining the complainant or in presenting other evidence. The Commonwealth may attempt to establish that any error was harmless. *Commonwealth v. Slaughter*, 482 Pa. 538, 394 A.2d 453 (1978). Unless the trial court is convinced that any error was necessarily harmless, it shall vacate judgment of sentence and grant appellee a new trial. *Commonwealth v. Hamm, supra.*

The case is remanded for proceedings consistent with this opinion.

Mr. Justice Larsen files a Dissenting Opinion in which Mr. Justice Hutchinson joins.

Mr. Justice Hutchinson files a Dissenting Opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

No. 69 W.D. Appeal Dkt. 1984

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

vs.

GEORGE F. RITCHIE,
Appellee.

Appeal from the Order of the Superior Court of February 3, 1984, at No. 137 Pittsburgh, 1981, vacating the Judgment of Sentence entered January 8, 1981, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, at No. CC7903887A

324 Pa. Super. 557 472 A.2d 220 (1984).

Argued: March 4, 1985 Filed: December 11, 1985

DISSENTING OPINION

JUSTICE ROLF LARSEN

The majority purports to conduct a "careful balance" between a defendant's rights under the Sixth Amendment to the United States Constitution to confront witnesses against him and to compulsory process of witnesses, on the one hand, and the victim's rights and other Commonwealth interests in maintaining the confidentiality of files held by child protective service

agencies in child abuse cases, on the other. However, the majority weights this "careful balance" heavily in favor of the defendant when it declares "the counters always in favor of the [Sixth] Amendment." Majority slip op. at 8. A truly careful balance must consider *all* of the respective interests at stake—not only the need of the defendant for disclosure of the information requested, but also the extent of the infringement of defendant's Sixth Amendment rights, if any, that would result if disclosure were prevented, as well as the need to preserve the confidentiality of the material sought.

The majority's decidedly *un*careful balance exaggerates the first consideration and all but ignores the latter two, and for what? The victim's rights and society's needs are ignored because the defense attorney muttered some nebulous assertions that "there could be possible witnesses disclosed . . . there could be matters in [the Child Welfare Services files] that would be favorable to the defendant." Notes of Testimony (N.T.), Pretrial Conference Hearing on Defendant's Motion for Sanctions, October 23, 1979 at 10. In allowing counsel on remand to scour the entire Child Welfare Service (CWS) file relating to the young victim in this case on no more than the flimsiest assertion that he *might* find *some matters or witnesses* that would be helpful to appellee, the majority has licensed a fishing expedition. Since *any* defense attorney in *any* criminal prosecution can *always* assert that there *may be some matters that could be helpful* to the accused, the majority's decision today does not just undermine the confidentiality of child protective service agency files, it *eliminates it* whenever a case against an accused child abuser is prosecuted.

As I believe the majority's decision violates the Child Protective Services Law (the Act), violates the dictates of principles enunciated by this Court in the *Matter of Pittsburgh Action Against Rape (PAAR)*, 494 Pa. 15, 428 A.2d 126 (1981), and is not compelled by the Sixth Amendment, I emphatically dissent.

The Child Protective Services Law, Act of November 26, 1975, P.L. 438, No. 124, *as amended*, 11 P.S. §§2201-2224 (Supp. 1985) declares that:

> Abused children are in urgent need of an effective child protective service to prevent them from suffering further injury and impairment. *It is the purpose of this act to encourage more complete reporting of suspected child abuse* and to establish in each county a child protective service capable of investigating such reports swiftly and competently, providing protection for children from further abuse *and providing rehabilitative services for children and parents involved* so as to ensure the child's well-being and to preserve and stabilize family life wherever appropriate.

11 P.S. §2202, Findings and purpose. To achieve this purpose, the Act establishes an elaborate mechanism coordinating statewide and local agencies which are required to provide, maintain and where appropriate, expunge comprehensive records and files of child abuse complaints and investigations. 11 P.S. §§2203-2207, 2214. An integral part of this mechanism is the confidentiality of records. Section 2215, Confidentiality of records, provides that "reports made pursuant to this act including but not limited to report summaries of child abuse ... as well as any other information obtained, reports written or photographs or x-rays taken

... in the possession of the department, a county children and youth social service agency or a child protective service *shall be confidential and shall only be made available to ...*" eleven specifically enumerated categories of persons or institutions. 11 P.S. §2215(a). The Act establishes that there is a compelling state interest in maintaining the confidentiality of records *except* in the enumerated instances.

Clearly, the confidentiality of records is not absolute under this legislative scheme. A court of competent jurisdiction is specifically authorized to enter an order of disclosure. 11 P.S. §2215(a)(5). The Act does not set out the parameters of the court's authority in a criminal prosecution to order disclosure of the presumptively confidential files and records to defense counsel upon request; however, this Court's recent decision in the *PAAR* case[1] does establish those parameters, as the Superior Court correctly held.

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[1] In *PAAR*, this Court was called upon to recognize a common law privilege against disclosure of confidential communications between rape crisis counselors and the rape victims, in the absence of any legislation recognizing such privilege. I would have recognized an absolute privilege for such confidential communications. *PAAR*, 494 Pa. at 34-63, 428 A.2d at 135-150 (Larsen, J., dissenting). (Shortly after this Court's decision in *PAAR*, the legislature acted swiftly to enact an absolute privilege for confidential communications between sexual assault counselors and sexual assault victims. 42 Pa.C.S.A. §5945.1.) In the instant case we do not address the issue of whether the common law would or should recognize an absolute privilege for confidential communications between child protective service agency personnel and abused children, for the legislature has spoken and has created a qualified privilege against disclosure of confidential records maintained by child protective service agencies.

Judge Cavanaugh, speaking for the Superior Court panel in the instant case, stated:

> In determining what information appellant is entitled to we are guided by the Pennsylvania Supreme Court's holding in *Matter of Pittsburgh Action Against Rape*, 494 Pa. 15, 428 A.2d 126 (1981). The issue in that case was "the extent to which a court presiding over a rape trial may authorize counsel for the accused seeking to impeach the credibility of the complainant to inspect a rape crisis center file containing communications between the complainant and rape crisis center personnel." 494 Pa. at 19, 428 A.2d at 127. The court there recognized the "societal interest" in promoting communications between rape crisis center personnel and persons seeking the center's assistance, but it also recognized the "compelling societal interest in the truth-seeking function of our system of criminal justice." 494 Pa. at 19, 428 A.2d at 127. In order to protect both interests, the court held that upon defense request, a trial court should authorize defense inspection of that portion of the crisis center's file which reflects verbatim statements of the complainant bearing on the facts of the alleged offense.
>
> . . . [W]e feel that the competing interests involved in *Matter of Pittsburgh Action Against Rape* are similar to those involved here and we are persuaded that the procedure adopted by the Supreme Court there should also be applied in the instant case. We hold, therefore, that appellant is entitled to inspect any portion of CWS' files which reflects statements regarding abuse made by Jeanette to the CWS' worker who examined her.

_____ Pa. Super. at _____, 472 A.2d at 225. The Superior Court also followed the *in camera* procedures and substantive limitations established by this Court in *PAAR*, namely that: (1) only "notes that are verbatim accounts of the complainant's declarations and notes that the complainant has approved as accurately reflecting what she said" are to be inspected by defense counsel; (2) the trial court is to conduct an *in camera* inquiry to determine whether the matters contained in the rape crisis counselor's files are such verbatim only "statements"; (3) after the trial court identifies the verbatim statements of the complainant, the defense counsel is to examine "these statements with an eye toward the utility or permissibility of their ultimate use at trial"; and (4) the defense counsel need not be given access to all statements in the file—rather, the court is to withhold from defense inspection "statements contained in a . . . file [that] have no bearing whatsoever on the facts of the alleged offense and [that] relate instead only to . . . counselling services. . . ." 494 Pa. at 28-29, 428 A.2d at 132. The majority in *PAAR*, therefore, did conduct a "careful balance" of competing interests, including the Sixth Amendment right to confront adverse witnesses, and limited defense counsel's access to the rape crisis counselor's files as outlined above. Defense counsel was not permitted to rummage through the files for any "matters that could be helpful", but was only permitted to inspect statements which defense counsel had specifically requested and which the trial court identified as substantially verbatim accounts of the victim, an item (prior statments) that has traditionally been available and highly beneficial to the defendant for use in cross-examining a witness. The need by the

defendant for such specific information contained in PAAR's files was felt to outweigh the victim's and Commonwealth's interests in maintaining confidentiality, but the *in camera* procedures set forth in *PAAR* were carefully crafted to tread as lightly as possible upon that confidentiality and to extract only that specific information requested by counsel and historically recognized as necessary and beneficial in the cross-examining of witnesses.

Nevertheless, the majority discards *PAAR*'s "careful balance", and allows defense counsel unfettered access to the CWS files simply because "[n]ow we are asked for the right to inspect the entire file." Majority slip op. at 11. In the majority's view, the Sixth Amendment "counters" (the right to confront adverse witnesses and to compulsory process of witnesses) are so heavy as to require unrestricted access by a defendant to scrutinize an entire confidential file in the possession of a child protective service agency *merely* because the defendant has vaguely suggested that there may be material in there that *could be* helpful. I do not believe the Sixth Amendment requires such intrusion into records that the General Assembly has seen fit to cloak with a privilege of confidentiality.

As the United States Supreme Court most recently stated:

> " 'The main and essential purpose of confrontation is to secure for the oppenent the opportunity of cross-examination.' " [Davis v. Alaska, 415 U.S. 308 (1941)] at 315-316 (quoting 5 J.Wigmore, Evidence §1395, p. 123 (3d ed. 1940) (emphasis in original)). Generally speaking, the Confrontation Clause

> guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . This conclusion is confirmed by the fact that the assurances of reliability our cases have found in the right of cross-examination are fully satisfied in cases such as this one . . .: the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused.

Delaware v. Fensterer, No. 85-214, 38 Cr.L. 4067, per curiam (November 4, 1985) (failure of expert witness to recall the method of scientific analysis he used to reach his opinion did not deprive defendant of his right to confront and to effectively cross-examine adverse witnesses; State Supreme Court summarily reversed).

The constitutional rights to confront adverse witnesses and to compulsory process, both federal and state, are *not absolute*. As this Court unanimously stated in *Commonwealth v. Allen*, 501 Pa. 525, 462 A.2d 624 (1983):

> It is clear that under both our state and federal constitutions, a criminal defendant has a right of compulsory process to obtain witnesses in his favor. Pa. Const. art. I §9. *See Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). However, *this right is qualified to the extent of existing testimonial privileges of witnesses, including the privilege against self incrimination. Id.* at 23, n. 21, 87 S.Ct. at 1925, n. 21.

Id. at 531, 462 A.2d at 627 (defendant's right to compulsory process not abridged by potential defense witness' assertion of privilege against self-incrimination).

Or, as the United States Supreme Court phrased it in *United States v. Nixon*, 418 U.S. 683 (1974):

> To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.
>
> Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial,
>
> "that 'the public . . . has a right to every man's evidence,' *except for those persons protected by a constitutional, common-law, or statutory privilege. . . .*"

Id. at 709-10 (citations omitted). *See also Davis v. Alaska*, 415 U.S. 308 (1974) (Court weighed competing interests to accommodate "tension between the right of confrontation and the state's policy of protecting the witness with a juvenile record"); *Ohio v. Roberts*, 448 U.S. 56 (1980) (right to confront witness not absolute; where witness unavailable, preliminary hearing testimony of that witness may be introduced if it bears sufficient indicia of reliability); *Smith v. Illinois*, 390 U.S. 129 (1968) (right of cross-examination fundamental to right of confrontation, but cross-examination is not unlimited and may be restricted if questioning goes beyond the bounds of proper cross-examination). In *McCray v. Illinois*, 386 U.S. 300 (1967), the Court held that the privilege against disclosure of an informer's identity did not violate the defendant's right to confront adverse witnesses under the circumstances, stating "no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest

in protecting the flow of information against the individual's right to prepare his defense." *See generally* Annot., *Federal Constitutional Right to Confront Witnesses—Supreme Court Cases*, 23 L.Ed.2d 853 (1970). Accordingly, when a defendant asserts the Sixth Amendment right to confront adverse witnesses or to compulsory process of witnesses against a claim of testimonial privilege, that "careful balance" must take place which will "depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the [information sought], and other relevant factors." *McCray v. Illinois, supra* at 386 U.S. 310, *quoting Rovario v. United States*, 353 U.S. 53, 61 (1957).

Since the particular circumstances of each case are critical to this balance, it is important to identify just what we are dealing with in this case—and what we are not. I begin with what we are not dealing with.

We do not deal with exculpatory material which the defendant has requested and which is in the possession of the Commonwealth. Although the Act authorizes disclosure of child protective service agency files to law enforcement officials investigating cases of child abuse, 11 P.S. §2215 (9) and (10), there is no indication that any law enforcement officials ever had access to the CWS files in question. Moreover, it is clear from the record that the prosecution did not have any information from the CWS records in its possession nor did the Commonwealth use CWS records in any way to prosecute appellee.

Defense counsel filed a motion and application for discovery pursuant to Pa.R.Crim.P. Rule 305. The motion tracked the language of Rule 305 and included requests for "any evidence favorable to the accused . . . in the possession or control of the attorney for the Commonwealth" and for "results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph . . . or other physical or mental examinations of Jeanette Biles." The court found that the Commonwealth had complied with the discovery request and had furnished appellee with all relevant information in its possession, except the court ordered the Commonwealth to provide defense counsel with all medical records it had in its possession. This order and finding was not challenged, and appellee does not now claim that the Commonwealth had in its possession any evidence or information gleaned from the CWS files. The testimony and argument presented at the *in camera* proceeding also supports the conclusion that the Commonwealth did not possess or control the CWS records.

In discussing the appellee's need for complete access to CWS's files in this case, the majority offers this metaphor: "When materials gathered become an arrow of inculpation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it." Majority slip op. at 11. Since the "arrows of inculpation" were never in the Commonwealth's possession, nor used against him in the criminal proceedings, this metaphor must be viewed as a melodramatic *non sequitur*, entertaining, perhaps, but having no place in the "careful balance" that we must perform to resolve the tension between the appellee's

Sixth Amendment rights *in this case* versus the victim's and state's interests in preserving the confidentiality of the CWS files.

Neither do we deal, in the instant case, with the "classic" Sixth Amendment right to confront or to compulsory process situations, *i.e.*, where a prosecution witness is unavailable and the prosecution seeks to introduce that witness' prior testimony or statements which will obviously not be subject to cross-examination, or where the state asserts some testimonial privilege or other interest to prevent a defendant from compelling a witness to appear as a defense witness. In these "classic" situations the defendant's Sixth Amendment rights are at their fullest extension—yet the rights are still not recognized as absolute and still must be balanced against competing state's and victim's interest. *See, e.g., Ohio v. Roberts, supra; Pointer v. Texas*, 380 U.S. 400 (1965); *Barber v. Page*, 390 U.S. 719 (1968); *Washington v. Texas*, 388 U.S. 14 (1967); *Commonwealth v. Allen, supra.*

Having seen what we do not have in this case, let us examine the factual matrix which does present itself to us. Defense counsel sought access to all information contained in presumptively confidential records of a child protective service agency, CWS, which information was arguably relevant to the criminal proceeding.[2] In an

[2] While I find it unlikely that any of the information in the CWS file is relevant to issues raised in the trial, I accept the Superior Court's explanation as to its *arguable* relevance. That court stated "that in view of the fact that Jeannette was permitted to testify that the sexual abuse had been going on for about four years, statements made by her regarding abuse at the time of the CWS examination are at least potentially relevant."

effort to acquire this information, counsel subpoenaed CWS and filed a pretrial motion for sanctions requesting the court to order CWS to allow counsel access to its records. At the pretrial conference hearing on the motion for sanctions, defense counsel asserted three justifications for disclosure. The first was that counsel believed the files would contain a medical report by a doctor who had allegedly examined the victim in September, 1978. The testimony at this hearing and at trial indicates that a medical examination did take place in September, 1978, but it did not seem to be an examination for sexual abuse. Counsel made no argument as to how this medical examination might have been helpful to the defense. Nevertheless, the court examined the CWS files and confirmed a CWS representative's statement that there was no medical report of a 1978 examination in the file. N.T. at 5, 11.

The only other reasons advanced by defense counsel to support his request for disclosure was that there "could be defense witnesses disclosed by their records there. There could be matters in there that would be favorable to the defendant." N.T. at 10. Asked by the court what "kind of witnesses" might be found in the CWS file, defense counsel replied "I don't know. Could be lots of witnesses." N.T. at 10. Unimpressed with counsel's "could be-s," the court declined to further examine the CWS records and denied the motion for sanctions.

At trial, appellee's accuser—his thirteen year-old daughter whom he had raped and abused for several years—took the witness stand and testified as to appellee's deranged atrocities. The victim was subjected

to vigorous and extensive cross-examination by defense counsel. A review of that cross-examination demonstrates that it was broad and unrestricted, except for certain instances when questioning strayed too far off course and the court, in its discretion, refused to allow some questions relating to clearly irrelevant matters, such as whether the victim "had boyfriends." *See, e.g.* N.T. Trial, November 7, 1979 at 81-82, 105-106. Counsel was permitted to cross-examine the victim at length about the incident of September, 1978. The victim testified that a lady from CWS visited her in September, 1978 and asked her some questions about anyone ever hitting her. A complaint had been made by an unidentified source. Appellee was present in another room of their residence when the CWS investigator questioned the victim. The victim further testified that she had been examined by a doctor in September, 1978, that her father, appellee, had taken her to the doctor's office, and that the victim had not made any complaints to the doctor at that time. N.T. Trial, November 7, 1979 at 56-124.

It is difficult to imagine, under all of the circumstances, how appellee's rights to confront adverse witnesses and to compulsory process were in *any way* infringed by the court's refusal to compel disclosure of the CWS files. Given the undeniably compelling interests of the victim and the state in preserving the confidentiality of child protective service files as established by the Act, given the minimal and highly speculative benefits that appellee might have gained had he been given access to the CWS records, and given appellee's vague assertions to the court that there "could

be" some matters favorable to appellee in those records, the careful balance of competing interests resoundingly tips in favor of non-disclosure and preservation of confidentiality.

None of the cases relied upon by appellee or by the majority require disclosure in this case. Only one case discussed by the majority even remotely resembles the factual circumstances of the instant case. In *Davis v. Alaska, supra*, the critical witness in the prosecution of Davis for burglary was Richard Green, a 17 year old who himself had a juvenile record of burglary. Green had testified for the prosecution that he had found the stolen cash safe near his property and reported it to the police. He also identified Davis as a man he had seen in the vicinity the night before he discovered the stolen property. Defense counsel sought to impeach the witness by introducing evidence of his juvenile burglary record and his probationary status, not to impeach his credibility generally but to cast the suspicion for the burglary of the safe to Green himself, and to indicate a motive for testifying against Davis. The trial court refused to allow defense counsel to introduce evidence of the witness' juvenile record or to question Green about that record, relying on Alaska statutory law prohibiting disclosure of juvenile records.

The United States Supreme Court conducted a careful balance in *Davis*, and concluded that, "[i]n this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender." 415 U.S. at 319. The balance tipped in favor of disclosure in *Davis* because the defendant's need and request for the information sought was specific and would have been

quite valuable to the defendant in helping to establish his defense, to demonstrate the witness' motivation for testifying and possibly lying, and to cast the witness as a possible suspect in the burglary. Refusing to permit defense counsel to cross-examine the witness as to his juvenile record for burglary completely foreclosed an important line of defense.

In the United States Supreme Court's recent *per curiam* decision in Delaware v. Fensterer, *supra*, the Court explained its decision in Davis v. Alaska, and delineated two broad categories of Confrontation Clause cases, stating:

> This Court's Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination. The first category reflects the Court's longstanding recognition that the "literal right to 'confront' the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause." (citation omitted) . . .
>
> The second category of cases is exemplified by Davis v. Alaska, 415 U.S. 308, 318 (1974), in which, although some cross-examination of a prosecution witness was allowed, the trial court did not permit defense counsel to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." As the Court stated in Davis, supra, at 315, "[c]onfrontation means more than being allowed to confront the witness physically." Consequently, in Davis, as in other cases involving trial court

restrictions on the scope of cross-examination, the Court has recognized that Confrontation Clause questions will arise because such restrictions may "effectively ... emasculate the right of cross-examination itself." Smith v. Illinois, 390 U.S. 129, 131 (1968).

This case falls in neither category. It is outside the first category, because the State made no attempt to introduce an out-of-court statement by Agent Robillard for any purpose, let alone as hearsay. Therefore, the restrictions the Confrontation Clause places on "the range of admissible hearsay," ... are not called into play.

The second category is also inapplicable here, for the trial court did not limit the scope or nature of defense counsel's cross-examination in any way.

38 Cr.L. 4068.

As in Delaware v. Fensterer, this case falls into neither category. We have already seen that this case is not in the first category, where the state attempts to introduce out-of-court statements against a defendant. Nor does this case fall into the Davis v. Alaska—restrictive cross-examination category.

In stark contrast to the setting in *Davis* is the setting presented in this case. As opposed to the particularized need for disclosure demonstrated in *Davis*, appellee here has suggested that the CWS files *could have* some favorable matters "in there." Counsel did not know what witnesses might be "in there," but there "could be lots." Moreover, counsel in this case was not restricted in any way from pursuing the matter of the September, 1978 incident on cross-examination of the victim. That cross-examination elicited from the victim all of the

information that counsel ever indicated *might be* found in the CWS files (*i.e.*, that she had been examined by a doctor in 1978 after a CWS worker had visited her upon an anonymous complaint, and that she had not made any complaints of abuse to the doctor). Under these circumstances, neither *Davis* nor any other Sixth Amendment cases or considerations require defense access to the CWS files.

Under the circumstances, I would hold that the CWS files are confidential and that the court properly denied defense counsel access to the file. However, given this Court's careful accommodation of competing interests in *PAAR*, and giving appellee the benefit of the doubt that "there could be matters in there that would be favorable" encompassed a request for verbatim statements to which he would be entitled under *PAAR*, I would affirm the Superior Court's *limited* remand to the court of common pleas. As in *PAAR*, if the CWS records contain such verbatim statements, defense counsel should be allowed to review those statements *only*. If no such statements exist, defense counsel would not be entitled to review *any* information in the file.

I would also instruct the lower court to consider the applicability of the unqualified privilege for confidential communications to sexual assault counselors that was enacted by the legislature in 1981 in response to this Court's decision in *PAAR*. 42 Pa.C.S.A. §5945.1. (*See* note 1 *supra*.) Obviously, a child protective service agency and its counselors will function as a "rape crisis center" and "sexual assault counselors", as those terms are defined by §5945.1(a), where the child has been sexually abused. Accordingly, "confidential

communications" made by the child to the counselor in such circumstances will be protected by this privilege which offers greater protection than the privilege provided in the Child Protective Services Law.

There is no question that appellee's June, 1979 rape of his daughter was a sexual assault. However, we cannot determine on the record before us whether the September, 1978 incident involved sexual assault, or whether the CWS files which appellee sought to inspect related to that incident or any incident(s) of sexual assault. The indications that do appear of record are to the contrary. I would instruct the lower court that, if the CWS files in fact pertain to incidents of sexual assault, then the unqualified privilege against disclosure of confidential communications would apply if the terms and provisions of §5945.1 are otherwise applicable.

Finally, I must emphasize my distress over the probable impact of the majority's decision. In allowing unfettered access to defense attorneys to fish through the files of child protective service agencies, counselors, guardians and parents will not be able to comfort the innocent and abused young victims with the security that the information they tell the agency personnel in confidence will not be scrutinized by their abusers. Nor will the confidentiality of the identity of those reporting suspected child abuse—a critical factor to the success of the Child Protective Services Law—be guaranteed; thus, the neighbor, relative, friend or acquaintance who suspects or witnesses child abuse might well decline to report such abuse if he or she knows that the abuser will be able to discover his or her identify so easily.

Permitting review of these records on no more than the barest assertion that they "might be helpful" destroys the confidentiality of the records and thoroughly frustrates the stated legislative purposes "to encourage more complete reporting of suspected child abuse and to . . . provid[e] rehabilitative services for children and parents involved so as to ensure the child's well-being and to preserve and stabilize family life wherever appropriate." 11 P.S. §2202. I urge the legislature to act swiftly to shore up the confidentiality provisions that have been substantially discarded by the majority today.

Mr. Justice Hutchinson joins in this dissenting opinion.

Appendix A—Opinion of the Supreme Court of Pennsylvania, Western District.

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

No. 69 Western District Appeal Docket 1984

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

vs.

GEORGE F. RITCHIE,
Appellee.

Appeal from the Order of the Superior Court of February 3, 1984, at No. 137 Pittsburgh, 1981, vacating the Judgment of Sentence entered January 8, 1981, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, at No. CC7903887A

324 Pa. Super. 557 472 A.2d 220 (1984).

Argued: March 4, 1985 Filed: December 11, 1985

DISSENTING OPINION

HUTCHINSON, *J.*

I join the dissenting opinion of Mr. Justice Larsen. However, on remand I would instruct the lower court to consider the application of the unqualified statutory privilege of sexual assault counselors for victim's communications to them, 42 Pa.C.S. §5945.1, to these facts, as affected by appellee's right of confrontation under the Sixth Amendment of the United States Constitution.

APPENDIX B

Opinion of the Superior Court of Pennsylvania

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 137 Pittsburgh, 1981

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

vs.

GEORGE F. RITCHIE,
Appellant.

Appeal from Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Allegheny County, at No. 790-3887A.

Before: CAVANAUGH, BROSKY and MONTGOMERY, *JJ.*

Filed: February 3, 1984

OPINION BY CAVANAUGH, *J.*:

Appellant George Ritchie was tried by a jury and convicted of rape, involuntary deviate sexual intercourse, incest, and corruption of minors. Post-verdict motions were denied and appellant was sentenced to a term of three to ten years incarceration. The instant appeal followed. For the reasons discussed below, we now vacate the judgment of sentence and remand for further proceedings.

The instant charges arose out of an incident involving appellant's daughter, Jeanette, who was thirteen at the time of trial. Jeanette testified that she was watching television on the evening of June 11, 1979, when appellant entered the room and demanded that she perform oral sex on him "or else" (N.T. at 24). Jeanette testified that based on past experience, she knew that the "or else" meant that if she did not do as appellant requested, she would be hit. Appellant forcibly removed Jeanette's clothes when she refused to do so and then forced her to commit oral intercourse. He then attempted to have normal intercourse with Jeanette, which caused pain to her. When the incident was over, appellant told Jeanette to go to bed.

Several days later, Jeanette told her cousin about sexual contacts between herself and appellant and the cousin told her mother, Jeanette's aunt. The aunt took Jeanette to the police station.

Appellant denied that he ever sexually molested Jeanette.

One of the claims raised by appellant is that the evidence was insufficient to convict appellant of rape. Specifically, appellant alleges that the Commonwealth failed to establish penetration. In reviewing the sufficiency of evidence, we must accept as true all the evidence, and the reasonable inferences therefrom, upon which the factfinder could have based its verdict and then ask whether that evidence, viewed in a light most favorable to the Commonwealth as verdict winner, was sufficient to prove guilt beyond a reasonable doubt.

Commonwealth v. Parker, 494 Pa. 196, 198, 431 A.2d 216, 217 (1981); *Commonwealth v. Stockard*, 489 Pa. 209, 212-13, 413 A.2d 1088, 1090 (1980).

We stated in the recent case of *Commonwealth v. Ortiz*, _____ Pa. Super. _____, 457 A.2d 559, 560-61 (1983), that:

> [i]t is quite clear ... that the definition of "sexual intercourse" found at [18 Pa.C.S.A. §3101] does not specify "penetration of the vagina." but instead specifies "some penetration however slight." ... *Commonwealth v. Bowes*, 166 Pa. Super. 625, 74 A.2d 795 (1950) ... is the only Pennsylvania appellate case specifically delineating what penetration means in this context. That case stated that entrance in the labia is sufficient: "To constitute the crimes of rape there must be penetration, *however slight*. (Res in re, but entrance in the labia sufficient: 44 Am. Jur., Rape, §3)." *Id.* at 628, 74 A.2d at 796 (emphasis in original). We therefore will not hold that a finding of penetration of the vagina is necessary for the jury to find "penetration however slight ...." ... [P]enetration of the vagina, in essence the farther reaches of the female genitalia, is not necessary to find penetration under Section 3101.

It is clear that the testimony of the victim alone can be sufficient to establish penetration so as to sustain a conviction of rape. *Commonwealth v. Crider*, 240 Pa. Super. 403, 361 A.2d 352 (1976). Jeanette testified that she was lying on her back on the floor and appellant was lying on top of her and that he tried to push his penis

into her vagina. This caused her pain and appellant finally desisted and told Jeanette to go to bed. We feel that Jeanette's testimony is sufficient to support a finding of penetration as defined in *Commonwealth v. Ortiz, supra.*[1]

Appellant next claims that the trial court erred in allowing Jeanette to testify that appellant had been sexually molesting her three or four times a week for a period of about four years, in spite of the fact that she could not remember the exact dates of any attack other than the one on June 11, 1979.

It is clear that "in a prosecution for incest it is 'competent for the commonwealth to introduce evidence of illicit relations between the parties prior to the commission of the specific offense laid in the indictment.' " *Commonwealth v. Buser,* 277 Pa. Super. 451, 455, 419 A.2d 1233, 1235 (1980) (quoting *Commonwealth v. Bell,* 166 Pa. 405, 411, 31 A. 123, 123 (1895), and *Commonwealth v. Leppard,* 271 Pa. Super. 317, 319, 413 A.2d 424, 425 (1979)). Such testimony is relevant to "show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial." *Commonwealth v. Buser,* 277 Pa. Super. at 455, 419 A.2d at 1235, (quoting McCormick on Evidence §190 at 449 (Cleary ed.1972)). Nor does the fact that Jeanette could not remember the exact dates of

[1] We note that Jeanette's testimony regarding oral intercourse would have sustained a verdict of rape as defined at 18 Pa.C.S.A. §§3121 and 3101. However, the court in the instant case, pursuant to the Commonwealth request, charged the jury that in order to find appellant guilty of rape, they must find "that there was some penetration, however slight, of the sexual organ of the female by the male." (N.T. 11-9-79 at 348).

previous sexual attacks render the testimony inadmissible. *Commonwealth v. Niemetz,* 282 Pa. Super. 431, 422 A.2d 1369 (1980).

Appellant admits that *Commonwealth v. Leppard, supra,* and *Commonwealth v. Buser, supra,* specifically hold that evidence such as that in question is admissible but he contends that these holdings violate his right to confront his accuser, and that they should therefore not be followed. We are not persuaded by his argument and decline to overrule the precedent. There was, therefore, no error in admitting Jeanette's testimony regarding prior sexual attacks.

Another claim raised by appellant is that the trial court erred in refusing to permit him to enter into evidence certain letters written by Jeanette to other individuals. The letters were offered for the purpose of showing that Jeanette freely communicated with persons outside her home and failed to mention either the sexual attacks by her father or the fear she allegedly had of him. Appellant hoped to discredit Jeanette's testimony by raising a question as to why she waited so long to report the sexual attacks which had allegedly been occurring for several years. The trial court held that the letters were not relevant, and therefore refused to admit them in evidence.

"Any analysis of the admissibility of a particular type of evidence must start with a threshold inquiry as to its relevance and probative value." *Commonwealth v. Walzack,* 468 Pa. 210, 218, 360 A.2d 914, 918 (1976).

> Determination of the relevancy of evidence offered at trial requires a two-step analysis. It must be determined first if the inference sought to be raised

by the evidence bears upon a matter in issue in the case and, second, whether the evidence "renders the desired inference more probable than it would be without the evidence." *Commonwealth v. Stewart*, 461 Pa. 274, 278, 336 A.2d 282, 284 (1975) (citations omitted).

The Commonwealth did not contend that Jeanette had no opportunity to report the sexual molestation at an earlier date or that appellant had prevented her from making any complaint. Jeanette freely admitted that she had numerous and frequent contacts with members of her family and friends during the period of time in question. She explained that she was afraid of her father and stated that she never would have gone to the police if she had not been taken to them by her aunt.

Since Jeanette had already testified as to her freedom to contact others, admission of the letters in question would not have made the desired inference "more probable than it would be without the evidence." McCormick on Evidence §185 (Cleary ed. 1972). Thus there was no abuse of discretion on the part of the trial court in refusing to admit the letters.

Appellant also claims that the trial court erred in permitting the Commonwealth to introduce testimony contrary to Jeanette's birth certificate, the effect of which was to bastardize her, in order to support its charge of incest. Helen Ritchie, Jeanette's mother, was permitted to testify that appellant George Ritchie, and not Thomas Bills, whose name appears on the birth certificate, was the natural father of Jeanette. Ms. Ritchie testified that although she was still married to

Thomas Bills when Jeanette was born, she had not had sexual relations with him for three years prior to Jeanette's birth. She further testified that appellant was the only man with whom she had had sexual relations around the time of Jeanette's conception and that appellant had admitted not only to her but to the Welfare Department, that he was Jeanette's father. Mr. Bills testified that he had not had sexual relations with Jeanette's mother for at least a year and a half prior to Jeanette's birth, and that appellant had admitted to him that he (appellant) was Jeanette's father. Ms. Ritchie married appellant after obtaining a divorce from Mr. Bills.

Appellant claims that the testimony outlined above should not have been permitted, claiming that "no authority exists for allowing a child to be bastardized in order to prove the crime of incest." (Appellant's Brief at 25).

Appellant ignores the holding of *Commonwealth ex rel. Leider v. Leider*, 434 Pa. 293, 254 A.2d 306 (1969), which says that a child is *not* bastardized by the testimony of the mother and her husband as to their non-access to each other at the time of conception in cases where the alleged father later married the mother, thus legitimizing the child. The testimony in the instant case is clearly admissible under the holding in *Leider*. *See also, Commonwealth ex rel. Savruk v. Derby*, 235 Pa. Super. 560, 344 A.2d 624 (1975); *Commonwealth ex rel. Meta v. Cinello*, 218 Pa. Super. 371, 280 A.2d 420 (1971).

Finally, appellant claims that the trial court erred in refusing to order Child Welfare Services (hereinafter referred to as CWS) to comply with appellant's subpoena

for files pertaining to an examination of the prosecutrix which occurred in 1978. He claims that his sixth amendment right to confrontation is superior to any claim the state might have regarding the need to maintain the confidentiality of the records.

In September, 1978, Child Welfare Services conducted an examination of Jeanette and her two younger brothers at the Ritchie home. The examination was prompted by a report of child abuse from an unidentified source and was CWS' only contact with Jeanette. Appellant's trial counsel served a subpoena upon CWS requesting that they turn over to him any records pertaining to Jeanette. CWS refused to produce the records based on a statutory provision regarding the confidentially of the records.[2] Appellant's motion for sanctions was denied after the court reviewed the records *in camera* and found that "no medical records are being held by Child Welfare Services that would be of benefit to the defendant in the case." Appellant contends that his counsel should have been permitted to review the files for himself, or that, at a minimum, he should have been granted access to any verbatim statements made by the prosecutrix contained in the file.

Appellant's right of confrontation must be weighed against the state's interest in maintaining the confidentiality of the information in the records. *David v. Alaska*, 415 U.S. 308, 319 (1974). We agree that the need

[2] 11 P.S. §2215(a) states that reports made pursuant to the Child Protective Services Law shall be confidential and shall only be made available to certain enumerated persons or agencies. Under §2215(a)(5), the reports shall be made available to a court of competent jurisdiction pursuant to a court order.

for confidentiality in this case must, to a certain extent, yield to appellant's right of confrontation. But we do not feel that appellant is entitled to examine the entire file kept by CWS. We feel, for instance, that the state's interest in maintaining confidentiality regarding the source of the complaint which triggered CWS' involvement outweighs appellant's right to obtain that specific information which does not appear to be relevant to the instant trial.

In determining what information appellant is entitled to we are guided by the Pennsylvania Supreme Court's holding in *Matter of Pittsburgh Action Against Rape*, 494 Pa. 15, 428 A.2d 126 (1981). The issue in that case was "the extent to which a court presiding over a rape trial may authorize counsel for the accused seeking to impeach the credibility of the complainant to inspect a rape crisis center file containing communications between the complainant and rape crisis center personnel." 494 Pa. at 19, 428 A.2d at 127. The court there recognized the "societal interest" in promoting communications between rape crisis center personnel and persons seeking the center's assistance, but it also recognized the "compelling societal interest in the truth-seeking function of our system of criminal justice." 494 Pa. at 19, 428 A.2d at 127. In order to protect both interests, the court held that upon defense request, a trial court should authorize defense inspection of that portion of the crisis center's file which reflects verbatim statements of the complainant bearing on the facts of the alleged offense.

We realize that the holding in *Matter of Pittsburgh Action Against Rape* is not directly on point. The issue there was whether the common law of Pennsylvania should be expanded to create an absolute privilege for all communications between rape crisis center personnel and their clients. It was not argued that any statute accorded a privileged status to such communications[3] or directed that records relating to such communications be kept confidential. In the instant case, there *is* a statute directing that the records at issue be kept confidential, but there is no claim of an absolute privilege of communications between CWS personnel and the children they investigate. Still, we feel that the competing interests involved in *Matter of Pittsburgh Action Against Rape*, are similar to those involved here and we are persuaded that the procedure adopted by the Supreme Court there should also be applied in the instant case. We hold, therefore, that appellant is entitled to inspect any portion of CWS' files which reflects statements regarding abuse made by Jeanette to the CWS' worker who examined her.[4]

The procedure employed by the trial court in the instant case was not sufficient to protect appellant's rights in spite of the court's "finding" that the records

[3] We note that subsequent to the decision in *Matter of Pittsburgh Action Against Rape*, a statute was enacted granting rape counseling communications an absolute privilege. 42 Pa.C.S.A. §5945.

[4] The CWS examination occurred over a year prior to the incident which is the basis of the charges in the instant case, and it might therefore be argued that anything contained in the file is irrelevant to this trial. We feel, however, that in view of the fact that Jeanette was permitted to testify that the sexual abuse had been going on for about four years, statements made by her regarding abuse at the time of the CWS examination are at least potentially relevant.

contained nothing that would benefit appellant. As the Supreme Court stated in *Matter of Pittsburgh Action Against Rape*:

> [i]t is not for the trial court to review these statements with an eye toward the utility or permissibility of their ultimate use at trial. . . . "Prior statements may, by themselves or in conjunction with other information known by the defense, open up valuable lines of cross-examination for the defense, even though the statements involve matters not directly relating to a witness' direct testimony . . . . 'Whether the statements of the prosecution's witnesses would have been helpful to the defense is not a question to be determined by the prosecution or by the trial court. They would not be reading the statements with the eyes of a trial advocate engaged in defending a client. Matters contained in a witness's statement may appear innocuous to some, but have great significance to counsel viewing the statements from the perspective of an advocate for the accused about to cross-examine a witness.' "

494 Pa. 15, 28-29, 428 A.2d at 132 (citations omitted).

We do not have the CWS records before us and therefore we are unable to determine whether they contain any statements to which appellant is entitled. We must therefore remand the case for further proceedings. We direct the trial court to review the CWS records *in camera* to determine whether they contain any statements made by Jeanette regarding abuse. If the court determines that there are no such statements, then

it should reinstate the judgment of sentence. If the records do contain such statements they should be made available to appellant's counsel, who should then be given an opportunity to argue to the court that the statements could have been used to discredit Jeanette's testimony. *Commonwealth v. Slaughter*, 482 Pa. 538, 394 A.2d 453 (1978). The Commonwealth should be permitted an opportunity to argue that the court's failure to provide appellant's counsel with the statements prior to trial was harmless error. If the court is not convinced that the statements were irrelevant or that any error was harmless, then it should grant appellant a new trial. *Commonwealth v. Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977). Following the court's ruling, either party may file an appropriate appeal.

In order to preserve the parties' rights to effective counsel and allow appellate review, the entire record reviewed by the court at its *in camera* proceeding should be preserved for appeal. This record may be sealed in order to protect its confidentiality. In addition, counsel should be permitted access to this record in order to argue the relevance of the material in accordance with this decision. Counsel, of course, are permitted access to this record for this purpose only and are otherwise bound by the confidential nature of the material in the record.

Judgment of sentence is vacated and case remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

Montgomery, *J.* files concurring and dissenting statement.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 137 Pittsburgh, 1981

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

vs.

GEORGE F. RITCHIE,
Appellant.

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Allegheny County, at No, 790-3887A.

Before: CAVANAUGH, BROSKY and MONTGOMERY, *JJ.*

Filed: February 3, 1984

CONCURRING AND DISSENTING STATEMENT BY MONTGOMERY, *J.*

I agree with the majority that appellant is entitled to direct statements made by the victim which appear in the CWS files. I would make a distinction not made by the majority, however, and limit appellant to only those statements bearing on the offense in question, that is, sexual abuse, rather than permitting inspection and use of statements regarding "abuse" in general.

APPENDIX C

Judgment Dated December 11, 1985

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

vs.

GEORGE F. RITCHIE,
Appellee.

JUDGMENT

December 11, 1985

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this Court that the judgment of the SUPERIOR COURT OF PENNSYLVANIA by, and the same is, AFFIRMED and CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

APPENDIX D

Order Dated February 3, 1984

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 137 Pittsburgh, 1981

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

vs.

GEORGE F. RITCHIE,
Appellee.

ORDER

AND NOW, this 3rd day of February, 1984, it is ordered as follows: JUDGMENT vacated and lower court directed to proceed in accordance with opinion filed herewith.